[redacted] decided to prevent clearly unwarranted [redacted] of personal privacy

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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 1 5 2010

SRC 08 050 53156

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner[1] seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner, a Ph.D. candidate at the time of filing, seeks employment as a vision scientist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional evidence, most of which relates to accomplishments that postdate the filing of the petition. For the reasons discussed below, we uphold the director's decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Master's degree in vision science from the State University of New York (SUNY) College of Optometry. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an

[1] On the Form I-140 petition, the petitioner is listed as the State University of New York, College of Optometry. The petition, however, is signed by the beneficiary as the self-petitioner.

advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

We concur with the director that the petitioner works in an area of intrinsic merit, vision science, and that the proposed benefits of his work, improved corneal health, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important

that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

On appeal, counsel asserts that the director failed to consider the petitioner's Ezell Fellowship and submits additional information about the fellowship as well as evidence that the petitioner received a second fellowship for the 2008-2009 academic year. The petitioner first received an Ezell Fellowship from the American Optometric Foundation (AOF) on July 12, 2007, which provided $8,000 to support his research during the 2007-2008 academic year. The notification letter advises that 21 optometric deans and presidents, 91 optometric faculty members and 98 Fellows of the American Academy of Optometry, including three past presidents, were Ezell Fellows. The fellowship was announced in SUNY's newsletter and the Association of Schools and Colleges of Education's *Eye on Education*. AOF's website materials, submitted by the petitioner, reflect that these fellowships are designed to "provide support for a graduate student." The AOF materials submitted on appeal state that Ezell Fellowships "provide financial support to post-graduate students who plan to pursue an academic career in optometry and vision science." Thus, it is not surprising that these fellows have gone on to academic careers in optometry, many successfully.

The Ezell Fellowship is essentially a research grant for graduate students. Research grants, while competitive, primarily fund future work rather than recognize the influence of past work. Clearly, the AOF determined that the petitioner's research proposal was promising and that he demonstrated the experience and credentials to carry out the proposed research. The grant is not, however, evidence of the petitioner's influence in the field.

In addition to the Ezell Fellowship, the petitioner submitted Certificates of Merit from the Minnie Flaura Turner Memorial Fund for Impaired Vision Research in 2005, 2006 and 2007; student travel awards and a Vision Research Research Scholar Award from SUNY. These awards all appear limited to students and are designed to provide financial support for students to perform research, attend conferences and continue their education. [redacted], a research scientist at Charité-Universitätsmedizen Berlin, asserts only that the fellowship is evidence of the petitioner's "potential of being an independent scientist." Recognition for achievements and significant contributions by peers, governmental entities or professional or business organizations is one of the regulatory criteria for

aliens of exceptional ability, 8 C.F.R. § 204.5(k)(3)(ii)(F), a classification that normally requires an approved alien employment certification. Section 203(b)(2) of the Act. We cannot conclude that meeting one of those criteria, or even the requisite three criteria warrants a waiver of that requirement in the national interest. *NYSDOT,* 22 I&N Dec. at 218, 222.

Similarly, the petitioner submits evidence of his student membership in the American Physiological Society and the American Academy of Optometry as well as his membership in the International Ocular Surface Society and the Association for Research in Vision and Ophthalmology (ARVO). The petitioner did not submit evidence that these associations require demonstrated influence in the field. Notably, professional memberships are one of the regulatory criteria for aliens of exceptional ability, 8 C.F.R. § 204.5(k)(3)(ii)(E), a classification that normally requires an approved alien employment certification. Section 203(b)(2) of the Act. As stated above, we cannot conclude that meeting one of the regulatory criteria, or even the requisite three criteria, warrants a waiver of that requirement in the national interest. *NYSDOT,* 22 I&N Dec. at 218, 222.

Also on appeal, counsel asserts that the director mischaracterized the reference letters that support the petition. We will consider these letters in detail below.

As stated above, the petitioner was a Ph.D. candidate at SUNY, where he received his Master of Science degree, as of the date of filing. At SUNY, the petitioner worked in the laboratory of [redacted], who provides a letter of support. [redacted] explains that the petitioner has been studying corneal epithelial roles in the maintenance of normal vision, which is important for identifying strategies that promote corneal epithelial wound healing following injury. Specifically, according to [redacted], the petitioner (1) identified how specific receptors activate downstream signaling events mediating control of corneal epithelial proliferation and cell migration, (2) improved our understanding how corneal epithelial cells sustain their normal cell volume during exposure to stresses, (3) identified receptors that mediate inflammatory responses needed to overcome bacterial infection and counter the development of corneal translucence and (4) identified a receptor that appears to act as an osmosensor whose activation is required for corneal epithelial cells to maintain their isotonic cell volume during exposure to osmotic challenges. [redacted] asserts that the third contribution has proven to be of interest to drug companies who are seeking to identify therapeutic approaches to lessen corneal pain associated with inflammation. [redacted] does not identify any interested drug companies and the record does not contain any letters from a drug company confirming their interest in the petitioner's work. In addition, [redacted] speculates that the petitioner's fourth contribution "could also be of great value in the effort to identify protocols needed to restore corneal epithelial integrity through restitution of regulatory volume capacity."

[redacted] notes that the petitioner's work with [redacted] is supported by a grant from the national Institutes of Health (NIH). Any research, in order to be accepted for funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who is working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement. [redacted] further states that the petitioner's studies required not only

advanced knowledge across a broad spectrum of subject but also state-of-the-art experimental techniques. [redacted] concludes that few researchers in the United States possess such a combination of expertise. Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for an alien employment certification. Special or unusual knowledge or training, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *NYSDOT*, 22 I&N Dec. at 221. Significantly, the petitioner submitted a nearly identical letter from [redacted], a professor at Kansas State University. While both [redacted] and [redacted] signed their letters, affirming their assent to the content of the letters, their use of near-identical language suggest that the language is not their own.

[redacted] discusses his collaboration with the petitioner relating to the role of transient receptor potential vanilloid channel (TRPV) in mediating corneal functionality. [redacted] asserts that the petitioner "principally contributed to the first detection of TRPV4 and their roles in the corneal epithelium defense again [*sic*] pathological conditions." [redacted] concludes that the petitioner's study "carries great value in providing a novel therapeutical [*sic*] approach (TRPV and its signaling substrate proteins) to them." [redacted] does not, however, identify any pharmaceutical company or independent research team pursuing a therapeutic approach based on the petitioner's work with TRPV.

[redacted] a professor at Baylor College of Medicine, asserts that he has reviewed the petitioner's publications and has attended his presentations. [redacted] explains that the petitioner's work with TRP implies a new approach for improving the postoperative visual results of LASIK surgery but does not provide examples of how the petitioner's work has already influenced LASIK procedures or is under consideration by LASIK providers.

[redacted] further explains that the petitioner was the first to identify the process whereby corneal cells regulate volume decrease to avoid extremes in cell volume changes and linked this process with the Mitogen activated protein kinase (MAPK) activation. While [redacted] notes that this work was published, he provides no examples of how it is impacting the field.

[redacted] of Wenzhou Medical College, asserts that he has known the petitioner since the petitioner was admitted to that college in 1996. [redacted] asserts that the petitioner established a "novel method of in vitro expanding human corneal stem cells (HCSC), a cell type that is responsible for corneal epithelium regeneration and wound healing." [redacted] explains that this method is superior to traditional corneal transplants as it improves the availability of HCSC while eliminating immunological rejection. While [redacted] asserts that this study was published, he does not indicate that the procedure has replaced traditional corneal implants or that a number of clinics are considering adopting this procedure. The record contains no letters from clinics that are using this procedure or considering doing so.

On appeal, [redacted], an instructor at Harvard Medical School, asserts that he collaborated with the petitioner on his TRPV research and that this research has led to consideration of an anti-TRPV drug as an excellent candidate to control dry eye associated inflammation and is in

pre-clinical trials for treatment of other chronic inflammatory disease, such as osteoarthritis. [redacted] a professor at Indiana University, asserts that TRPV antagonists have been shown to be effective in phase I/II clinical trials in treating migraines and irritable bowel syndrome. The record does not establish the petitioner's connection to migraine and irritable bowel syndrome studies and contains little evidence regarding the use of the anti-TRPV drug identified by [redacted] for dry eye treatment. For example, the record contains no letters from clinicians attesting to their use of this drug for dry eye associated inflammation based on the petitioner's work. The record also contains little information about the pre-clinical trial, including where they are occurring and whether they were conceived prior to the date of filing, the date as of which the petitioner must establish his eligibility. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

In addition, [redacted] for Academic Affairs at the University of North Texas Health Sciences Center, asserts that several citations demonstrate that the petitioner's work has inspired other studies. First, not every citation represents a study that could not have been performed absent the existence of every article cited in that study. The petitioner submitted two examples of articles that cite his work. The first, a review, indicates that the petitioner extended the previous research of another research team. The second relies on the work of the petitioner and other research teams as a possible explanation for a phenomenon in the study being reported. Regardless, the citations noted by [redacted] postdate the filing of the petition.

The petitioner submits evidence that seven of his articles have now been cited,[2] with no article receiving more than seven citations. Only one of the citations predates the filing of the petition. In fact, the petitioner's article that has received seven citations was itself published after the date of filing. While citations that postdate the filing of the petition can, on a case-by-case basis, be considered as evidence of the field's continued reliance on an alien's work, in the matter before us, there was almost no reliance on the petitioner's work as of the date of filing.

As stated above, the petitioner must demonstrate his eligibility as of the filing date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. at 49. In this matter, that means that he must demonstrate his track record of success with some degree of influence on the field as a whole as of that date. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak,* 14 I&N Dec. at 49; *see also Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) for the proposition that we cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that his recently published research will

[2] The director's decision references citations of the petitioner's work although the record before the director contained no evidence of citations. Rather, the petitioner submitted requests for reprints, which carry far less weight than citations as they do not demonstrate the requestor's subsequent reliance on the petitioner's work.

subsequently prove influential. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008).

The opinions of experts in the field are not without weight and have been considered above. U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain bare assertions of influence. While the letters discuss the petitioner's work in detail and affirm its importance, they do not provide specific examples of how his work had influenced the field as of the date of filing. The petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition, which could have bolstered the weight of the reference letters.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.